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NO. 624

IN THE

Supreme Court of the United States

October TERM, 1955

MACK BARNES, *Petitioner*

V.

THE STATE OF TEXAS, *Respondent*

ON A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Criminal Appeals of the State of Texas (R. 142-145 is reported at _____ Texas Criminal Reports, S. W. (2d) _____. The opinion on the Motion for Re-hearing (R. p. 157-159) is reported at _____ Texas Criminal Reports _____, _____ S. W. (2d) _____.

(Opinions fully printed appendix page 20)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 26th day of June, A. D., 1954, to which Petitioner filed a motion for re-hearing, which Motion was overruled on the 10th day of November, A. D., 1954, and the Petitioner filed a Second Motion for Re-hearing, which was overruled on December 1, 1954. The jurisdiction of this Court is envoked under 28 U. S. Code annotated Section 1257 (3). Defendant objected to the arrest made by the purported officers of the City of Cleburne, Texas, while riding in an automobile, without a warrant and without probable cause in violation of the laws of the constitution of the United States and Texas, at the time of the trial before the District Court of Johnson County, Texas, the Honorable Penn Jackson, District Judge, presiding, which objection was overruled and exception thereto duly noted (R. p. 42). The Defendant also objected to the admission of the power of the officers of Johnson County to arrest without a warrant for the reason that there was no ordinance providing such authority and establishment of a police department prescribed in the City charter, which objection was overruled and exceptions noted (R. p. 43). The Defendant objected to the introduction of evidence discovered by reason of illegal arrest and in violation of the constitutional rights of the United States and State of Texas, all of which are indexed in the Record on page 50, all of which objections were overruled and exceptions noted thereto. The Defendant objected upon the trial of this cause to the argument of counsel for the reason that same was inflamatory and was not based upon this cause, which

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objection was overruled and exceptions noted (R. p. 40-41 and 45). The Defendant also objected upon the completion of the trial that the evidence admitted by the Court was insufficient to support a verdict and warrant a conviction in this cause, which objection was overruled and exceptions noted (R. p. 37-38). All of the above objections set out herein were renewed in Defendant's First Amended Motion for New Trial (R. page 27), which motion was overruled and judgment was entered (R. p. 31), whereupon Defendant in open Court excepted to such judgment and gave notice of appeal to the Court of Criminal Appeals of the State of Texas at Austin, Texas, (R. p. 31). The Defendant cited as error all of the above bills of exceptions including the illegal arrest, inadmissability of the evidence unlawfully obtained, the insufficiency of the evidence and argument of counsel herein, but the Court of Criminal Appeals of the State of Texas in its opinion held, although there was no search warrant or direct report of violation of a felony of breach of peace by a credible person to the officers and although the officers had not seen any felony or breach of peace committed in their presence, that mere suspicion was sufficient probable cause for the arrest and that evidence discovered by reason of illegal arrest was admissable. The Defendant further contended that the evidence was insufficient for the reason that it was based upon circumstantial evidence and that it did not meet the burdens placed upon the State and that same was insufficient, but the Court of Criminal Appeals, using its imagination and putting into the record facts that did not exist and presuming certain facts that do not exist in the record, held that there was conspiracy to commit a burglary, all

in violation of the laws and rules of evidence and the rights for a fair trial to this Defendant. The Defendant in his Motion for Rehearing urged the Court to correct the errors made by the Court in its original opinion, but the Court held that said evidence was still admissable and that there was probable cause for the arrest, and although they agreed with the Defendant that the mere riding in the car was not sufficient, but that the finding of the bag in the car was evidence against him and stated that they had adhered to their views expressed in the original opinion.

Whereupon Petitioner obtained a stay of execution of ninety (90) days pending the perfection of his application for writ of certiorari in this Court (R. p. 176). The petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas was filed December 14, 1954.

Whether the Court of Criminal Appeals of the State of Texas erred in their opinion that a motor vehicle might be stopped and the passengers therein arrested without probable cause and upon mere suspicion and that the evidence obtained thereby was admissable against the passengers riding in said automobile when an arrest is made without warrant, all of which was in violation of the constitution of the State of Texas, and of the Fourth and Fifth amendments of the Constitution of the United States and the laws of the State of Texas.

Whether the evidence was insufficient to support a verdict of conviction of this appellant and whether he was convicted under due process.

STATUTE INVOLVED

Article 1723 Penal Code of State of Texas.

STATEMENT

On the 29th day of December, 1953, your Petitioner, MACK BARNES, was indicted by the Grand Jury of Johnson County, Texas, and charged with having in his possession and control a bomb. Specifically the indictment charged

> "that MACK BARNES on or about the 6th day of December, A. D., 1953, and anterior to the presentment of this indictment, in the County of Johnson and State of Texas, was then and there unlawfully possessed and have in his control a bomb, to wit: a collection of nitro glycerin capable by its ignition and explosion of causing damage to persons and property."

Upon the trial of this cause before a Jury the District Court of Johnson County, Texas, your Petitioner was found guilty and the jury assessed a penalty of five (5) years in the penitentiary. Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this Writ of Certiorari is directed.

The evidence reveals that L. E. SMITH, who was called as a State's witness, testified that on the 6th day of December, A. D., 1952, he was living in Cleburne, Texas, and that on the night of the 6th of December 1952, that he and his family had been to a theatre in Cleburne and that after the theatre he and his family came out and went to their car, which was located in a parking lot at the corner of James and Caddo streets in Cleburne,

Texas, and surrounding said parking lot was a prescription pharmacy, the Yale Theatre and the Liberty Hotel, and that at the time he came out of the theatre it was around ten o'clock p.m. and that said parking lot was well lighted; there were lights on the inside of the pharmacy and there were street lights and lights around the top of the pharmacy and lights from the hotel across the street, and that he saw two fellows on this parking lot and saw them get into an automobile; that he saw one of the men carrying a bag, which he later identified as Glen Roach, but that he failed to identify the second man as your applicant herein, and that he and his family left and he went to find officers for the reason that he was suspicious that something was happening, but that he did not see any crime committed. That he found a police car which contained Harold Nelson, Cliff Benson and Bob Kimbrell and that he gave them a license number, which he claimed he had committed to memory, of said automobile and when the officers went back to this location they saw said automobile backing from the parking lot with one man in it and that around the corner were two men standing on a curb and the car drove around where the other two men were standing and stopped and the two men got into the car.

Harold Nelson was called by the State and was a purported officer on the police force of Cleburne. He testified that at the time he stopped said car that he asked the occupants thereof to get out. He testified that he saw the car started from its parking location and that two men got in it and that they just drove normally, there was no speeding, they didn't pass any stop signs or red lights; that no law was violated that would cause him to stop said

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vehicle, and that he stopped them because they were under suspicion only, that nothing unusual had attracted his attention, and if he hadn't had the license number that he would not have been attracted by them at all, and that he had no search warrant at the time he arrested them and none of the other officers had a search warrant, and yet he said that the report made to him by Smith was that there was something down there and that he, Smith, supposed that they were stealing hub caps and fender skirts, a misdemeanor in Texas. That upon opening the door he saw a bag, but that upon examining the bag, after he took it out of the car, he found that it contained nitro glycerin, all of which evidence was discovered after the illegal arrest. That the next morning after the arrest Smith was brought in to identify the men, and Smith still failed to identify this applicant as being one of the men he saw that night, and so far as the record is concerned, the only evidence shown against this applicant is that he was standing on the curb and got in and rode with James Buchanan Hill, owner of the car and that said car was stopped and the arrest was made. There is no evidence that he committed any crime, had any knowledge of any criminal contraband being carried in the car, or that he had same in his possession at the time.

Upon the trial of the case of James Buchanan Hill, evidence was developed that at the time James Buchanan Hill got out of the car and walked back to where the officers were that he told them at that time that the bag and its contents belonged to him and that he was taking it to some friends, this evidence was not introduced or adduced at the trial of this applicant and was withheld by the State, and such evidence was not known to the appli-

cant herein at the time of his trial, and the first knowledge he had of same was when it was adduced upon the trial of the said James Buchanan Hill.

It is the contention of your Petitioner that the arrest was illegal and that any evidence found therein was not admissable against this applicant and that without such inadmissable evidence a conviction could not have been had, and further, that it did not meet the requirements of the rule of circumstantial evidence to show that this person and no other person committed the offense and a conviction could not have been had of this Petitioner. In fact, at the time the jury was out upon the trial of this cause, the Honorable Penn Jackson, Judge of the District Court of Johnson County, remarked to the Defendant's attorney that he should have granted the Defendant's Motion for Acquittal because he did not feel that there was sufficient evidence for a conviction, but that he felt that the higher court would send it back in the event a conviction was had, and at the time the Motion for New Trial was presented he expressed the thought at that time that such motion should be granted, but he would permit the higher court to pass upon same.

The jury convicted your Applicant and assessed a penalty of five (5) years in the penitentiary, from which your applicant appealed to the Court of Criminal Appeals of Texas.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Criminal Appeals of Texas erred:

(1) In holding that there was sufficient probable cause to

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authorize the officers to stop the automobile and seize the contents of the bag contrary to the Fourth amendment of the Constitution of the United States of America and Article I, Section 9 of the Texas Constitution whereas the facts in the record negative the existence of probable cause.

(2) In holding that evidence discovered by illegal arrest and seizure is admissable in violation of Fourth Amendment and Fourteenth Amendment to Constitution of the United States of America, and Article I, Section 9 of Constitution of Texas.

(3) In holding that the evidence was sufficient to support a conviction, and that the applicant was accorded a fair and impartial trial, in violation of the due process clause of the Fourteenth amendment to the Constitution of the United States of America and of the Constitution of the State of Texas, and against the laws of the United States and State of Texas.

ARGUMENT

I

The Court of Criminal Appeals of Texas in its opinion affirming this cause held contrary to prior cases with reference to probable cause, both in the State Court and Federal Court, for stopping motor vehicles. It failed to pass upon the constitutionality of the manner of the arrest and seizure, which applicant contends was illegal and in violation of the fourth amendment to the United States Constitution and Article 1, Section 9 of the Constitution of the State of Texas, and in violation of the laws of the United States and the State of Texas.

The Court of Criminal Appeals of Texas has held in many cases that *mere suspicion* is not sufficient probable cause to stop a motor vehicle and make arrest upon the evidence discovered thereby. In *Moore v. State*, 294 *S. W.* 550, it was held:

> "Constitutional prohibition of unreasonable searches and seizures protects citizens from arrest on mere suspicion."

This same court held in *Gill vs. State*, 115 *S. W.* (2d) 923, as follows:

> "Mere suspicion will not authorize an officer to arrest without a warrant or to search premises and possessions of suspect."

These are just a few of the cases held by this Court on this proposition of law, but Court of Criminal Appeals of Texas has held contrary to all of these cases in this cause.

In Texas the Legislature has passed laws regulating the arrest, both by private citizens and police officers, without a warrant, and are shown as follows:

Art. 212 C. C. P. of Texas:

> "A peace officer or any other person, may without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an offense against the public peace."

The Court of Criminal Appeals of Texas in holding as it did in its opinion in this cause held contrary to former holdings by it, and as one example we quote from *Gonzales vs. State*, 95

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S. W. (2d) 972, as follows:

> "they had not observed him committing a felony. He was not in their view, and they did not know he was then violating the law, as they did not know he was in the house at the time. They may have had a strong suspicion that he was doing so, but suspicion is not sufficient to authorize a peace officer to arrest without a warrant."

We will also cite 45 Supreme Court 280 in which this Honorable Court also held,

> *Carroll vs. United States*:
>
> "An office may not without violating the fourth and fifth amendments upon mere suspicion of a misdemeanor, stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime."
>
> "Intoxicating liquor obtained by search of an automobile stopped upon the highway upon mere suspicion that Plaintiffs in error were transporting liquor in violation of the law which made such transportation a misdemeanor is inadmissable because it was obtained in violation of the constitutional rights of the Plaintiffs in error, the search having followed an illegal and unauthorized arrest."
>
> *Silverthorne Lumber Co. v. United States*, 251 *U. S.* 385, 40 *Supreme Court* 182, 24 *ALR* 1426, 65 *L ed* 319.
>
> "The essence of a provision for bidding the acquisition of evidence in a certain way is that not merely evidence so

acquired shall not be used before the Court but that it shall not be used at all.

"Knowledge of fact gained from an independent illegal search and seizure may be proved like any other fact, but the knowledge gained by the Government's own wrong cannot be used by it in a prosecution."

Marron vs. United States, 275, *U. S.* 192, 48 *Supreme Court* 74, 72 *L ed* 231:

"The Fifth Amendment to the Federal Constitution protects every person against incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment."

Amos v. United States, 255 *U. S.* 313, 41 *Supreme Court* 266, 65 *L ed* 654:

"The rule that Courts will not stop the progress of the trial of a criminal case to frame a collateral issue to inquire whether evidence offered otherwise competent was lawfully or unlawfully obtained has no application where it becomes apparent during the trial that there has been an unconstitutional seizure of the property of the accused and the Court should exclude such property and any testimony relating thereto given by the Government Agents who made the unlawful seizure on motions of the accused made after both property and testimony were introduced in evidence against him."

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Goldstein v. United States, 316 *U. S.* 114, 62 *Supreme Court* 1000, 86 *L ed* 1312:

"Evidence obtained by an unlawful search and seizure in violation of the Fourth Amendment cannot be used in evidence even indirectly against the victim if he makes timely objection thereto."

Olmstead v. United States, 72 *L ed* 944, 952, 953 *and* 961:

"Evidence obtained by a crime of the officers of the law should be excluded."

Lustig v. United States, 338 *U. S.* 74, 69 *Supreme Court* 1372, 93 *L ed* 1819:

"Vendicated anticipation of what an illegal search may reveal does not validate a search otherwise illegal."

Johnson v. United States, 333 *U. S.* 10, 68 *Supreme Court* 367, 92 *L ed* 436:

"A search made without a warrant cannot be justified as an incident of arrest unless the arrest itself was lawful."

Art. 214, C. C. P. of Texas:

"The municipal authorities of towns and cities may establish rules authorizing the arrest without warrent of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws."

In this cause the City of Cleburne had no ordinance as required by the laws of Texas to make arrests under this article.

The Court of Chirimal Appeals of Texas in *Woods v. State*, held as follows:

> "We think it is clear that, in order for a City Marshal to have the authority under the provisions of Art. 214, C. C. P. to make an arrest without a warrant, the Municipal authorities of the town or city must have established rules by the enactment of an ordinance authorizing the arrest without a warrant under the conditions described in said article."

As it has been shown by the record this area was well lighted on all sides, in the heart of the City, next to a theatre and across from a hotel, and could not possibly be a suspicious place, and there is no evidence in the record that applicant was guilty of some felony or breach of peace, or that he had threatened or was about to commit some offense against the laws.

Article 215 C. C. P. of Texas:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest accused."

There is no evidence that satisfactory proof was brought to a peace officer by a credible person that a felony had been committed and that the offender was about to escape, but on the con-

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trary, it shows that no felony was committed by this applicant and that he did nothing to indicate he was trying to escape.

In fact, the City of Cleburne failed to pass an ordinance organizing a police department as authorized by the Charter. There is no such ordinance in the record. The prosecution was attempting to justify the illegal arrest, without a warrant.

In Texas the Legislature passed Article 729a, as follows:

> "No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."

Where there is a statute excluding evidence unethically and unlawfully obtained, the Court should exclude such evidence.

II

The State of Texas depended on circumstantial evidence for a conviction of this applicant, and it is contended that the holding of the Court of Criminal Appeals of Texas is contrary to the rules governing the sufficiency of the evidence to support a conviction. In this cause the Court of Criminal Appeals of Texas has injected into this cause, in its opinion, presumptions not based on facts in the record. In its opinion of affirmance the Court itemized the facts which it held the evidence to be sufficient, and we will show the Court that these do not meet the rule.

In the first instance the Court sets out that two men and a certain automobile were seen under suspicious circumstances at

the Prescription Pharmacy, which was closed at the time. One of the men was Glen Roach.

The facts show that neither of the two men referred to by the Court was the applicant. The place where the two men were was well lighted as has been hereinabove set out. If the applicant was not one of the two men referred to, this would not be binding upon him and should not be presumed as evidence against him. The Court attempts to leave the impression that the record points to this applicant as one of the men, but it does not, but shows to the contrary.

In the second instance the Court set out that two men later seen near the pharmacy, and when the police car passed the Oldsmobile parked nearby, it drove away and picked up these two men, one of whom was shown to be the appellant.

The Court fails to show that at the time the police car arrived at this point that there were now three men. The record does not reflect that the men which the car stopped and permitted to enter were the same two men, referred to in the first instance. If applicant was one of the men entering the car when it stopped, and accepted a ride, is not sufficient proof that he possessed a bomb. This is another presumption by the Court.

In the third instance the Court set out that a bag containing burglary tools and a partially full bottle of whiskey was found on the floorboard immediately to the rear of appellant's feet. Appellant had been drinking.

The facts in the record show that the bag was concealed under

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the front seat of the car, and there is no evidence that applicant had knowledge that it was there or that he knew it contained material in violation of the law. It contained some ordinary tools used by mechanics and a bottle with whiskey in it, but it was found in the automobile owned and driven by James Buchanan Hill, and applicant was merely a passenger in the car. There is no evidence in the record that this applicant drank from this bottle of whiskey. This is another presumption of the Court not based on facts in the record.

In the Fourth instance the Court set out that a tool often used in burglaries was found near where Hill picked up the applicant and Roach.

The record shows that after the arrest, the officers returned to the place applicant entered the car and many feet from where he was picked up, a crow bar was found. There is no evidence how, when or who left the crow bar at this spot, but the Court presumed that it was a burglary tool and was left there by the applicant. This is the worst kind of violation of the rule of circumstantial evidence.

It seems that the Court again went far afield when it held that the mere presence of the applicant in the automobile was not sufficient, but believed that the facts as shown in the holding were sufficient to show that applicant was acting together in a burglarious enterprise with Hill and Roach, and thereby had joint possession of the bag and its contents.

There is no facts in the record to base such presumption by the

Court, and is a new and different fact injected into this cause by the Court, as there are no facts to show a burglarious enterprise.

This Honorable Court is familiar with the rule governing the sufficiency of the evidence in cases depending upon circumstantial evidence for a conviction, and it is not necessary to repeat it here.

III

The Court of Criminal Appeals of Texas held that the argument of the prosecutor to the effect that applicant had been drinking from the bottle found in the bag was a logical deduction from the evidence. The applicant objected to this argument for the reason that the prosecutor stated it as a direct fact, and that there was no evidence to support or base such direct statement and fact. The manner in which it was stated could not possibly have been taken as a logical deduction.

In its holding in this cause the Court of Criminal Appeals of Texas has gone contrary to the rules of evidence and prior holdings by it. This only confuses the law and the judges who try the cases, and the lawyers will be at a loss as what the law is or should be during the trial. The judges are not firm and sure in their rulings, and the lawyers prepare their appeals with misgiving because the law is confused and not being sure whether the higher court will render a holding that will clear the law or further confuse it.

It is one of the rules in circumstantial evidence cases that a conviction cannot stand by presuming presumptions upon presumptions, but that is what the Court of Criminal Appeals of

Texas has done in this cause in order to justify its holding of affirmance.

This Honorable Court should give this matter careful consideration, because it is a serious thing and should be cleared and permit the logical and reasonable holdings of the Court of Criminal Appeals of Texas, preceeding this holding to remain the law, and protect all of the rights of a citizen as guaranteed by the constitution and laws of our land.

If this remains as the law in Texas, the citizens will not be safe in their travels on the highways without being stopped and molested by the police, knowing that the Courts will back them up in their unlawful action and admit evidence illegally obtained, and is not logical, and is unreasonable.

Under the present holding of the Court of Criminal Appeals of Texas, the laws and Constitution have been destroyed and this Court should use its supervisory powers to correct same and protect the people of Texas, and give them back their constitutional rights under the United States Constitution and of Texas. That this is offensive to human dignity.

CONCLUSIONS

For reasons stated, it is respectfully submitted that the judgment of the Court of Criminal Appeals of the State of Texas should be reversed.

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APPENDIX

OPINION

The offense is possession of a bomb; the punishment, 5 years.

The witness Smith testified that as he left the picture show on the night in question he observed two men near an Oldsmobile which was parked adjacent to his automobile close to the Prescription Pharmacy. He stated that as he approached they hastily got in the Oldsmobile and that one of them, whom he later learned to be Glen Roach, was carrying a bag with handles. He did not get a good view of the other man and could not identify the appellant as being such man. He inspected his automobile to determine if anything had been stolen therefrom, took the license number of the Oldsmobile, and reported the same to the police.

Officer Wilson testified that he received the license number from Smith and proceeded in search of the Oldsmobile. He stated that as he passed the Prescription Pharmacy he saw two men standing on the sidewalk; that he proceeded on James Street and saw the Oldsmobile, which bore the license number he had been given, parked with only the driver seated therein; that he made a U-turn and as he returned the Oldsmobile drove off and turned on Caddo Street; that the two men who had been standing on the sidewalk got into the Oldsmobile, and he followed it. He stated that he overtook it on West Henderson Street and signaled it to stop, that when the two automobiles came to a halt and the driver of the Oldsmobile, whom he later learned to

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be James Buchanan Hill, the owner thereof, got out and came back to the police car, and that he went forward to the Oldsmobile, where he found Glen Roach seated in the middle and the appellant seated on the outside. When these two got out he stated that he saw a canvas bag on the floorboard behind where their feet had been. The bag was shown to contain a quantity of nitroglycerin, detonation caps, wires, a sledge hammer, punches, gloves, and a partially empty bottle of whiskey. The appellant had been drinking.

Officer Wilson further testified that after placing these men under arrest he returned to the Prescription Pharmacy and there found under a window a large crowbar.

On the issue of probable cause, Officer Wilson testified, in the absence of the jury, that Smith had reported to him that some men were hiding behind an Oldsmobile when he came out of the show and suggested that he should investigate to see whether they were stealing.

Chemist Tullis of the Department of Public Safety testified that the nitroglycerin, the wires and the caps were capable of producing an explosion of such a nature as to cause damage to persons and property by either of two methods of detonation.

Appellant contends that the evidence is insufficient to show that he exercised any control over the contents of the bag.

We think the following facts are significant:

1. Two men and a certain automobile were seen under suspicious circumstances at the Prescription Pharmacy, which was closed at the time. One of the men was Glen Roach.

2. Two men were later seen near the Pharmacy, and when the police car passed the Oldsmobile parked nearby, it drove away and picked up these two men, one of whom was shown to be the appellant.

3. A bag containing burglar tools and a partially full bottle of whiskey was found on the floorboard immediately to the rear of appellant's feet. Appellant had been drinking.

4. A tool often used in burglaries was found near where Hill picked up the appellant and Roach.

We agree with the appellant that his mere presence in the Oldsmobile was not sufficient, but we also believe that the above facts are sufficient, to show that appellant, Hill and Roach were acting together in a burglarious enterprise and, in so doing, had joint possession of the bag and its contents.

The argument of the prosecutor to the effect that the appellant had been drinking from the bottle found among the burglar tools was, we think, a logical deduction from the evidence.

Appellant cannot complain of the search of the automoblie belonging to Hill. *Smith v. State*, 262 *S. W. 2d* 723. We think the facts detailed above constituted sufficient probable cause to authorize the officers to stop the Oldsmobile and the contents of the bag therein authorized the arrest of the appellant.

Finding no reversible error, the judgment of the trial court is affirmed.

Morrison, Judge

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OPINION

ON MOTION FOR REHEARING

Appellant complains herein and again asserts the illegality of the search of the automobile in which he was found sitting with a blue bag against his feet. We think this matter of the search of the automobile does not depend upon the provision of the charter of the City of Cleburne which allowed the arrest without a warrant of persons within that city under certain circumstances. We think that the officers were within their right to search upon probable cause and that they found beneath the appellant's feet a collection of articls that would constitute, if properly arranged, a bomb that could be used not only for the purpose of entering a building or opening a safe but could also destroy human life if used in a certain manner.

So far as this record shows, Mr. Hill, the man who owned the automobile, did not complain of the search of his car after the appellant, as well as his companions, had been placed under arrest.

We think that the presence of a half empty bottle of whiskey in such bag under the appellant's feet had no effect upon whether or not he was in possession of a bomb or the collection of articles that would constitute such bomb at such time, and was of no great import herein.

Appellant also complains of the fact that a large iron bar was found under a window of a building near which he and his companions were seen acting in a suspicious manner. We think

that might have had some bearing before the jury in showing with what intent the appellant and his companions were in possession of a bomb whcih was dangerous to property as well as to human life.

It is worthy of note, however, that the sufficiency of an indictment in words and figures the same as the one herein presented has already been passed out by this court in the recent case of *Roach v. State,* (Tex. Cr. R.) 269 S. W. (2d) 379, and was therein held to be sufficient to charge the elements of the offense.

Believing the proper disposition of the case to have been made in the original opinion, the motion for rehearing is therefore overruled.

Graves, Presiding Judge.

(Delivered Nov. 10, 1954.)

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MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 27, 059

MACK BARNES, *Appellant*	COURT
VS.	APPEAL FROM DISTRICT
THE STATE OF TEXAS	JOHNSON COUNTY,
Appellee	TEXAS

AFFIRMED
OPINION BY JUDGE MORRISON
JUNE 26, 1954

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 27,059

MACK BARNES, *Appellant*	APPEAL FROM DISTRICT
vs.	COURT OF JOHNSON
THE STATE OF TEXAS,	COUNTY, TEXAS
Appellee	

MOTION FOR REHEARING OVERRULED
BY JUDGE GRAVES, PRESIDING JUDGE
NOV. 10, 1954

This cause came on to be heard on Appellant's Motion for Rehearing and the same being considered, it is ordered, adjudged and decreed by the Court that said motion be, and the same is hereby in all things overruled.

ORDER

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify in Cause No. 27,059

MACK BARNES, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

Appellant's Second Motion for Rehearing was denied, without written opinion, on December 1, 1954.

WITNESS my hand and seal of said Court, this 18th day of January, A.D. 1955.

Glenn Haynes,
Clerk, Court of Criminal Appeals

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FILED
APR 25 1955
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 624

MACK BARNES,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 624

MACK BARNES,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Criminal Appeals of Texas and the opinion on Motion for Rehearing are not yet printed. They appear, however, in Petitioner's brief in the Appendix thereto, pp. 20-24.

Jurisdiction

Petitioner has not invoked the jurisdiction of this Court under 28 U.S.C. 1257(3) for the following reasons:

1. Nowhere in the record, and particularly in Petitioner's Bill of Exception and Motion for New

Trial, did Petitioner specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

3. The grounds of error here presented were never urged in any definite manner before the trial court and under the rules of practice in the Court of Criminal Appeals in Texas, the latter Court could not consider such alleged errors, and this Court is without power to consider Federal questions not raised in accordance with the requirements of State laws.

3. The decision of the Texas Court of Criminal Appeals rests upon adequate non-federal grounds.

4. The Fourth Amendment to the United States Constitution applies only to the Federal government and not to State officers.

Argument and Authorities on Jurisdiction of the Supreme Court

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. 1257(3) without complying with the requirement of such statutes in that, contra to his assertion, Petitioner did not specifically set up or claim any right, title, privilege or immunity under the Constitution of the United States. A review of Petitioner's Bills of Exceptions Nos. 4, 5 and 8 and his amended motion for a new trial shows this to be true, for his objections and exceptions there made were wholly insufficient to notify the trial court of any Federal question now being urged, and not hav-

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ing been thus set up or claimed in that Court, the Petitioner has failed to invoke the jurisdiction of this Court.

The scope of review of the Court of Criminal Appeals of Texas is limited to the grounds or assignments of error which a defendant has preserved by an adequate Bill of Exception and motion for new trial in the trial court. The Texas Court has expressly held that such matters as are not thus set up or assigned cannot be considered by it on appeal. *Zieg v. State*, 74 Tex. Crim. 306, 171 S.W. 747 (1914); *Harvel v. State*, 126 Tex. Crim. 580, 72 S.W. 2d 604 (1934); and this course has been followed even in a death penalty where on appeal complaint was first made of matters not objected to or excepted to during the trial. *Fisher v. State*, 108 Tex. Crim. 623, 2 S.W. 2d 249 (1927).

As early as 1877, this Honorable Court advanced and adhered to a policy that it did not have jurisdiction if any alleged violated right was not pointed out in the trial court. Mr. Chief Justice Waite, speaking for the Court in ex parte: *Spies*, 31 Lawyer's Edition 80, stated that the Supreme Court had no jurisdiction to review such matter as the State Court itself could not review. In the Spies case, the error complained of on appeal was that a letter said to have been obtained by an illegal search should not have been admitted into evidence. Part of the opinion pertinent here is to the following effect:

> "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any

treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and therefore, no foundation is laid under this objection for the exercise of our jurisdiction."

The Court's present policy is the same and can be seen in the recent case of *Edelman v. California*, 344 U.S. 357 (1953), wherein the Petitioner contends that his conviction for vagrancy violated the Due Process Clause of the 14th Amendment, such contention being made for the first time as one of Petitioner's grounds of appeal. In language reminiscent in the Spies case, Justice Clark, speaking for the Court, said:

"It is clear that this court is without power to decide whether constitutional rights have

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been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U.S. 275, 50 L. Ed., 1026, 26 S. Ct. 617 (1906); *Mutual Life Inc. Co. v. McGrew*, 188 U.S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L.R.A. 33 (1903). Non compliance with such local law can thus be an adequate state ground for a decision below. Aside from state law regarding the scope of review in cases such as this one, we note that California permits affirmance in criminal cases where the appellant fails to appear. It follows that the question whether the vagrancy statute is invalid under the Fourteenth Amendment is not properly before us."

In the view of these pronouncements and the adherence of this Honorable Court to a well defined policy requiring any Federal question to be "specially set up or claimed" the Petitioner has never invoked the jurisdiction of this Supreme Court. His only objection being so broad as to say in effect that his arrest is in violation of the United States Constitution, and he gave the trial and appellate court below nothing to decide and such having occurred, this Court is without a jurisdictional basis to grant a Writ of Certiorari or to review the prior proceedings in any manner. The Court based its decision entirely upon non-federal grounds, and did not consider any question relating to a violation of the Fourteenth Amendment. As stated in *Lynch v. New York*, 293 U.S. 52 (1934):

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from

> the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Furthermore, where it appears that the judgment of the State court *might** have rested on a non-federal ground, this Court will not take jurisdiction. *Stembridge v. Georgia*, 343 U.S. 541 (1952).

It is submitted that the Court of Criminal Appeals of Texas in this case did not find it necessary to base its decision on the merits, if any, of a federal claim or claims, if any, but that adequate state grounds existed for final determination of the cause.

Statement

Petitioner was indicted by Grand Jury, charged with the offense of possessing a bomb under Article 1723, Texas Penal Code (Vernon 1948), convicted and sentenced to 5 years in the penitentiary.

> "The witness Smith testified that as he left the picture show on the night in question he observed two men near an Oldsmobile which was parked adjacent to his automobile close to the Prescription Pharmacy. He stated that as he approached they hastily got in the Oldsmobile and that one of them, whom he later learned to be Glen Roach, was carrying a bag with handles.

*Emphasis added throughout.

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He did not get a good view of the other man and could not identify the appellant as being such man. He inspected his automobile to determine if anything had been stolen therefrom, took the license number of the Oldsmobile, and reported the same to the police.

"Officer Wilson testified that he received the license number from Smith and proceeded in search of the Oldsmobile. He stated that as he passed the Prescription Pharmacy he saw two men standing on the sidewalk; that he proceeded on James Street and saw the Oldsmobile, which bore the license number he had been given, parked with only the driver seated therein; that he made a U-turn and as he returned the Oldsmobile drove off and turned on Caddo Street; that the two men who had been standing on the sidewalk got into the Oldsmobile, and he followed it. He stated that he overtook it on West Henderson Street and signaled it to stop, that when the two automobiles came to a halt and the driver of the Oldsmobile, whom he later learned to be James Buchanan Hill, the owner thereof, got out and came back to the police car, and that he went forward to the Oldsmobile, where he found Glen Roach seated in the middle and the appellant seated on the outside. When these two got out he stated that he saw a canvas bag on the floorboard behind where their feet had been. The bag was shown to contain a quantity of nitroglycerin, detonation caps, wires, a sledge hammer, punches, gloves, and a partially empty bottle of whisky. The appellant had been drinking.

"Officer Wilson further testified that after placing these men under arrest he returned to the Prescription Pharmacy and there found under a window a large crowbar.

"On the issue of probable cause, Officer Wilson testified, in the absence of the jury, that Smith had reported to him that some men were hiding behind an Oldsmobile when he came out of the show and suggested he should investigate to see whether they were stealing." Opinion, Court of Criminal Appeals, page 20 of Petitioner's Brief.

Questions Presented

1. Does this Court have jurisdiction?
(See "Jurisdiction" above)

2. Assuming, *arguendo*, that jurisdiction exists, was the arrest of Petitioner herein illegal?

3. Assuming, *arguendo*, that jurisdiction exists, was the evidence acquired in the above arrest admissible?

4. Assuming, *arguendo*, that jurisdiction exists, has there been a violation of due process under the Federal or State constitutions or laws?

Argument

The argument that this Court does not have jurisdiction is set out above under the "Jurisdiction" heading. Further, it must be noted that Petitioner's Points of Error (1) and (2) on pages 8 and 9 of his brief claim a violation of the Fourth Amendment to the United States Constitution, and Article I, Section 9 of the Texas Constitution. It is submitted that the Fourth Amendment ordinarily is directed only against the Federal government and its agencies and

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not against the individual conduct of State officials. *U.S. v. Smith*, 23 F. Supp. 528 (1938); *State v. Vilott*, 1 S.W. 2d 827 (1927). Cases cited by Petitioner throughout his brief stand generally for the proposition that there must be probable cause for an arrest and that mere suspicion is not enough. This of course is true and point up the fact that there is probable cause in this case.

Counter Point I in Answer to Petitioner's Point (1)

Article 1, Section 9 of the Texas Constitution reads as follows:

> "*No Unreasonable Seizures and Searches Allowed*—
>
> "The people shall be secure in their persons, houses, papers and possessions from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation."

There has been no violation of the Texas Laws or Constitution, nor the Federal Constitution or Laws. Probable cause for the arrest is shown. (S.F. pp. 6, 7, 26, 27) Upon information from a credible person, the police officer made the arrest and search.

The facts and circumstances within the knowledge of the arresting officer and of which he had reasonably trustworthy information were sufficient to warrant a man of reasonable caution that probable

cause existed. *Carroll v. U. S.*, 267 U.S. 132 (1925), *State v. Vilott, supra; Pruett v. State;* 114 Tex. Crim. 44, 24 S.W. 2d 41 (1930); *Minor v. State*, 153 Tex. Crim. 242, 219 S.W. 2d 467 (1949); *Rutherford v. State*, 135 Tex. Crim. 530, 121 S.W. 2d 342 (1938); *Bevins v. State*, 110 Tex. Crim. 52, 7 S.W. 2d. 532 (1928); *Jones v. State*, 122 Tex. Crim. 344, 55 S.W. 2d 560 (1932).

Article 214, Texas Code of Criminal Procedure (Vernon 1948), reads as follows:

> "The municipal authorities of towns and cities *may* establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or about to commit some offense against the laws." (Emphasis added.)

Petitioner contends that such rules had not been established by the City of Cleburne. Assuming this to be true, it is submitted that the above article is permissive and not mandatory, and that the duties and powers of a peace officer are set out in Article 37, V.C.C.P., as follows:

> "It is the duty of *every peace officer* to preserve the peace within his jurisdiction. To effect this purpose, he shall use all lawful means. He shall, in every case where he is authorized by the provisions of this Code, *interfere without warrant to prevent or suppress crime.* He shall execute all lawful process issued to him by any

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> magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. *He shall arrest offenders without warrant in every case where he is authorized by law,* in order that they may be taken before the proper magistrate or court and be tried. (Emphasis added.)

Then, under Article 215, V.C.C.P., which states:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, *without warrant,* pursue and arrest the accused."

It is then the officers' duty to pursue and capture the offender and to seek all possible information. *Agnello v. U. S.* 269 U.S. 20 (1925); *Hill v. State,* 37 Tex. Crim. 415, 35 S.W. 660 (1896); *Cortez v. State,* 47 Tex. Crim. 10, 83 S.W. 812 (1904).

It is clear then that under the general laws of the State of Texas (Art. 37, V.C.C.P.) that the peace officers were acting within the scope of their authority by law already occupied by legislative enactments. The city charter was not inconsistent with the general laws of Texas relating to the same matters or subject. *Leach v. Coleman,* 188 S.W. 2d 220 (Tex. Civ. App. 1945, error ref.) Furthermore, a policeman of a city is a public officer holding his office as a trust from the State, and not as a matter of contract between himself and the city. *Ex parte Preston,* 72 Tex. Crim. 77, 161 S.W. 115 (1913).

Counter Point II in Answer to Petitioner's Point (2)

It is worthy of note that Petitioner cites no authorities in support of his Argument for Points II and III.

The following quotations from *Carroll v. U. S. supra*, are pertinent.

> ". . . The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable. . . .
>
> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.
>
> ". . . So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category [of the Fourth Amendment]. Commonwealth v. Dana, 2 Met. (Mass.) 329. Many other things of this character might be enumerated.

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". . . The guarantee of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

". . . The rule for determining what may be required before a seizure may be made by a competent seizing official is not to be determined by the character of the penalty to which the transporter may be subjected.

". . . If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient [to show probable cause.]"

Petitioner herein did not own the automobile which was searched and cannot complain of the evidence so obtained. *Smith v. State*, Tex. Crim., 262 S.W. 2d 723 (1953); *Moss v. State*, 135 Tex. Crim. 181, 117 S.W. 2d 428 (1938); *Lee v. State*, 148 Tex. Crim. 220, 185 S.W. 2d 978 (1945); *Brubaker v. U.S.*, 183 F. 2d 894 (1950); *U.S. v. Pisano*, 193 F. 2d 361 (1951).

Petitioner cites Article 729a, V.C.C.P., on page 15 of his brief. He apparently meant to cite Article

727a, V.C.C.P., since there is no Article 729a in the Code. If Petitioner meant to cite 727a, his quotation thereof on page 15 of his brief is incorrect since he quotes the article as amended by Acts 1929, 41st Leg., 2nd C.S., p. 79, ch. 45, § 1, and Article 727a correctly quoted reads as follows:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case."

It appears that Texas has adopted all laws of the United States and all portions of the United States Constitution which pertain to the use of evidence obtained in violation thereof.

Assuming this to be true, your Respondent submits that Petitioner must still show jurisdiction, a violation of the laws of the United States, or a violation of a constitutional provision, *which he has not done*, and, further, Petitioner does not allege what United States statute, if any, is violated.

Furthermore, as stated by this Court in *Schwartz v. Texas*, 344 U.S. 199 (1952) at page 203, in construing Article 727a (before the 1953 amendment):

> "It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence."

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Counter Point III in Answer to Petitioner's Point (3)

In approaching the question of due process, it must be remembered that in our particular dual form of government, nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as that power has been withdrawn by the Federal Constitution. *Hurtado v. California*, 110 U.S. 535 (1884). This Court may not pass upon the expediency, wisdom, or justice of the laws of the State, but may only determine their conformtiy with the Federal Constitution. In determining due process this Court may take into account only those fundamental rights which are expressed in that provision. *Twining v. New Jersey*, 211 U.S. 78 (1908). Due process requires that the Court have jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714 (1877), and that there shall be notice and opportunity for hearing given the parties. *Roller v. Holley*, 176 U.S. 398 (1899). Subject to these two fundamental rules, this Court has sustained all State laws regulating procedure, evidence and methods of trial as being constistent with due process of law. *Walker v. Sauvinet*, 92 U.S. 90 (1875); *Caldwell v. Texas*, 137 U.S. 692 (1891); *Leeper v. Texas*, 139 U.S. 462 (1891); *In re Duncan*, 139 U.S. 449 (1891), and *Twining v. New Jersey*, *supra*.

From these decisions it is clear that the Fourteenth Amendment in no way undertakes to control the power of the State to determine by what process legal

rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted complies with reasonable notice and affords fair opportunity to be heard. As stated in *Louisville and Nashville Railroad Co. v. Schmidt*, 177 U.S. 230 (1900):

> "... It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity has been afforded him to defend; . . ."

See, also, *Hooker v. Los Angeles*, 188 U.S. 314 (1903), and *Rogers v. Peck*, 199 U.S. 425 (1905).

Furthermore, in a prosecution in a State Court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. *Wolf v. Colorado*, 338 U.S. 25 (1949).

It is not clear from Petitioner's notice of appeal and brief filed herein just what action he seeks from this Court. In his Conclusion, Petitioner assumes that certiorari or jurisdiction in a direct appeal has been established, since he asks that the judgment of the Court of Criminal Appeals be reversed and not that a Writ of Certiorari be granted by this Court.

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Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari and/or Jurisdiction should be denied.

Respectfully submitted,

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Capitol Station
Austin, Texas

Attorneys for Respondent

April ....., 1955

A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the Supreme Court of the United States, have been mailed this date to Hon. Angelo Piranio, 630 Gibralter Life Building, Dallas, Texas, Attorney for Petitioner, by first class mail, postage prepaid.